SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 312

WORTHINGTON AMES AND GERTRUDE AMES,
HUSBAND AND WIFE,

Petitioners,

vs.

EMPIRE STAR MINES COMPANY, LTD.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

I.

Opinion of the Court Below.

OPINION OF THE CALIFORNIA SUPREME COURT RENDERED JANUARY 31, 1941, *Worthington Ames and Gertrude Ames, Husband and Wife, Plaintiffs and Appellants,* v. *Empire Star Mines Company, Ltd., et al., Respondent* (17 A. C. 228, 2 Cal. Dec. 151).

II.

Jurisdiction.

THE QUESTION OF FEDERAL LAW BELIEVED TO SUSTAIN JURISDICTION OF THIS PETITION IS SET FORTH IN A JURISDICTIONAL STATEMENT FILED HEREWITH.

III.

Statement of Case.

SUCH STATEMENT IS SET FORTH IN THE PETITION FILED HEREWITH (pp. 5-9) AND, THEREFORE, IS NOT REPEATED HERE.

IV.

Specification of Errors.

THE CALIFORNIA SUPREME COURT ERRED IN HOLDING:

1. That title to lands granted to a railway company in aid of railroad construction did not pass title until the patent was issued, and then that title to the surface only passed. This is contrary to the uniform decisions of the United States Supreme Court;

2. That when the patent was issued in the case here involved to the railway company that this did not conclusively determine that the Ames land was non-mineral. This is contrary to the holding of the United States Supreme Court;

3. That the patent, when issued to the railway company, did not relate back to the date of the Congressional grant, thereby confirming title in a common law fee as of July 25, 1866;

4. That extralateral rights could be acquired under the Mining Act of Congress of July 26, 1866 (14 Stat. A. L. 251) in lands which had previously been granted to the railway company and later confirmed to the railway company by patent;

5. That extralateral rights were acquired under the Act of May 10, 1872 (17 Stat. A. L. 91) in a claim which exceeded 1500 feet in length;

6. That a mining claim patented under the Act of May 10, 1872, acquired extralateral rights in lands previously granted to the State of California as school lands;

7. That evidence inadmissible according to the general rules of evidence and insufficient for that purpose proved the location of mining claims under miners' rules and regulations, and United States statutes.

V.

ARGUMENT.

1. Summary.

A summary of the argument herein presented setting forth petitioners' position cannot be better stated than was stated by Mr. Justice Carter in his dissenting opinion (17 A. C. 271):

> "The Railroad Grant Act of July 25, 1866, created a present grant of nonmineral land to the railroad company; that is, the grant took effect as of that date, if and when the railroad company complied with the provisions of the act with reference to the location and construction of a railroad and filed its map of location with the General Land Office. The grant of such land remained a float until the filing of such map, and title thereupon vested in the railroad company subject to the determination by the General Land Office as to whether or not said land was mineral or nonmineral in character. If the land Office determined that any of the land covered by the grant was mineral in character, the same was excluded from the grant, and the railroad company was given other nonmineral land in lieu of the mineral land so excluded. If the Land Office determined that the land covered by the grant was nonmineral, and a patent was issued to the railroad company, the issuance of such patent conclusively determined the nonmineral character of the land, and the railroad company got a common law fee in land

granted, including all mineral deposited therein. Unless discovery of mineral in paying quantities was called to the attention of the government officials before patent was issued to the railroad company, all claims to the mineral in such land was cut off by the issuance of such patent. The provision in a patent issued to a railroad company excepting mineral or mineral land from the grant was and is void, and the railroad company was granted a common law fee including all mineral deposits in the land upon the issuance of the patent.

"A valid mineral location gives to the locator the right to follow extralaterally on their dip downward all veins apexing on his claim which penetrate other mineral lands, but extralateral rights do not exist in agricultural or nonmineral lands.

"When the Land Office determined the Ames Tract was nonmineral in character and the government issued a patent thereto to the railroad company, the latter was granted a common law fee in said land which related back to the date of the passage of the Railroad Grant Act of July 25, 1866, and cut off all intervening rights of those asserting that said land was more valuable for mineral than nonmineral purposes. The defendant therefore is barred from asserting the right to extract mineral from the Ames Tract upon the theory that it may do so under the extralateral right doctrine."

2. The grant to the railway company was a grant in praesenti, and passed title on the effective date of the granting act.

The granting act (14 Stat. A. L. 239), Section 2, reads:

"That there be, and hereby is granted, etc."

This constituted an immediate grant of the land to the railway company.

Wisconsin v. *Price*, 133 U. S. 496, 509.

The language of the court in the *Wisconsin* case is particularly appropos in the facts of the case at bar. In part the court, at p. 509, says:

"But when the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title attached to them and took effect as of the date of the grant, so as to cut off all intervening claims."

Deseret Salt Co. v. *Tarpey*, 142 U. S. 241. In this case, at p. 248, the court says:

"In a great number of cases grants containing similar terms have been before this court for consideration. They have always received the same construction, that unless the terms are restricted by other clauses, they import a grant *in praesenti*, carrying at once the interest of the grantor in the lands described."

In *Jatunn* v. *Smith*, 95 Cal. 154, 157, the California Supreme Court said:

"On the contrary, the grant of land to the company by the acts of Congress of July 1, 1862, and July 2, 1864, to aid in the construction of its road, was a grant *in praesenti* of every alternate section of land not reserved by such granting acts, passing the legal title thereto as of the date of the grant, as soon as those sections were identified by a legal survey, and the definite location of the road for which the grant was made."

The same court, in the same case, at p. 159, said:

"When the legal title to land is granted by act of Congress, the title of the government is as effectively divested as it would be by the issuance of a patent therefor by the executive department, under authority of law, and such land then becomes subject to the limitation laws of the State in which it is situated; and an adverse possession thereof after the date of such grant for the requisite period fixed by such laws will ripen into a legal title in favor of the adverse possessor, and the effect of such possession is not interrupted or defeated by the subsequent issuance of a patent therefor, in pursuance of such act of Congress."

Mr. Lindley says (Lindley, Mines (2d ed.) Sec. 154):

> "Grants of particular sections or of lands 'in place' do not acquire precision until the lands are surveyed and the line of the road is definitely fixed. Until such time the grant is said to be a float, and congress retains the power to otherwise dispose of them. Such grants are, however, grants *in praesenti*. They attach to particular tracts as soon after the filing of the map of definite location of the road as these tracts become identified by survey; and when so identified, title vests in the company, in the absence of legal impediments, by relation as of the date of the passage of the act. This is too well settled to require argument. The authorities in support of it are numerous and uniform."

In the case at bar, the California Supreme Court, in the face of the foregoing unquestionable authorities, said (17 A. C. 234):

> "In the present case there was no final and definite location of the Ames Tract by the railroad until the securing of the patent in 1880. Under the act of July 25, 1866, it had merely a 'floating grant' whereby it might secure title to land on which it subsequently located. When the Ames Tract was finally and definitely located in 1880 its subsurface not only was known to be mineral but was subject to the vested extralateral rights of the adjoining mines."

By this ruling the California Supreme Court thus gave priority to the title to both mining claims. In the light of the foregoing authorities this ruling was error and served to defeat petitioners' rights.

3. The grant to the railway company was a grant of all the estate and title of the United States in the Ames land which was a common law fee.

Deseret Salt Co. v. *Tarpey*, 142 U. S. 241, 248:

> "No partial or limited interest is designated, but the lands themselves are granted, as they are described

> by the sections mentioned. Whatever interest the United States possessed in the lands was covered by those terms, unless they were qualified by subsequent provisions, a position to be presently considered."

By virtue of the foregoing authority, the railway company acquired a fee simple title in the Ames land as of July 25, 1866.

Nevertheless, in the case at bar, the California Supreme Court said (17 A. C. 234):

> "The subsurface of the Ames Tract being clearly mineral could not pass under the terms of the act but remained in the government, and the Pennsylvania and Jefferson mines received full extralateral rights therein by virtue of the Mining Act of July 26, 1866".

The California court cited cases to support this ruling which are not in accord therewith. None of them held that a patent, when issued, conveyed only the surface of the land described. An exception inserted in a patent by the Land Office that is not authorized by Congress is void:

Burke v. *Southern Pac. R. R. Co.*, 234 U. S. 669, 710.

Neither can a court limit a patent in a way not authorized by Congress. In none of the various land grants, made by Congress in aid of railroad construction, were they limited to surface rights and prior to the case at bar, no court has ever so held.

As further evidence of the fallacy of the holding of the California Supreme Court is the mineral land exception clause of the granting act. Mineral lands were excepted but in lieu of excepted lands other lands were granted. If the subsurface of the Ames land, or any part thereof, came within the exception then the railroad company became entitled to an equal amount of subsurface lands at some other place. The mere statement of this shows the absurd result to which it would lead. The court, in *Burke* v. *South-*

ern Pac. R. R. Co., 234 U. S. 669, 676, completely answered this contention of the California Supreme Court when it said:

> "This granting act, like several others of that period, expressly excluded from its operation 'all mineral lands' other than iron and coal lands. No attempt was made at defining 'mineral lands', and doubtless the ordinary or popular signification of that term was intended."

The foregoing points and authorities completely establish petitioners' contention as to their title.

4. The patent to the Ames land when issued to the railway company conclusively determined that the Ames land was non-mineral and not within the exception of the granting act.

West v. *Standard Oil Co.*, 278 U. S. 200, 211:

> "Ordinarily, where an act granting public lands excludes those known to be mineral, the determination of the fact whether a particular tract is of that character rests with the Secretary of the Interior. See *Cameron* v. *United States*, 252 U. S. 450, 464; *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 684-87. But compare *Dunbar Lime Co.* v. *Utah-Idaho Sugar Co.*, 17 F. (2d) 351. If such act provides for the issue of a patent, whether it be to pass the title or to furnish evidence that it has passed, the patent imports that final determination of the non-mineral character of the land has been made. The issue of the patent terminates the jurisdiction of the Department over the land. See *Barden* v. *Northern Pacific R. R.*, 154 U. S. 288, 327-331; *Courtright* v. *Wisconsin Central R. R. Co.*, 19 L. D. 410; *Heirs of C. H. Creciat*, 40 L. D. 623. And in the courts the patent is accepted, upon a collateral attack, as affording conclusive evidence of the non-mineral character."

Burke v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 710:

"2. Does a patent to a railroad company under a grant which excludes mineral lands, as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

"Answer.—A patent issued in such circumstances is irregularly issued, undoubtedly so, but as it is the act of a legally constituted tribunal and is done within its jurisdiction, it is not void and therefore passes the title (*Noble* v. *Union River Logging R. R.*, 147 U. S. 165, 174-175), subject to the right of the Government to attack the patent by a direct suit for its annulment if the land was known to be mineral when the patent issued. *McLaughlin* v. *United States*, 107 U. S. 526; *Western Pacific Railroad Co.* v. *United States*, 108 U. S. 510."

Smelting Co. v. *Kemp*, 104 U. S. 636, 640-41:

"The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, a land department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and, therefore, it has been held in various instances by this court that their

judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law."

Galve v. *Best*, 78 Cal. 235, 237;
Vore v. *Ephraim*, 173 Cal. 245, 248;
Lindley, Mines (3d ed.), Sec. 161;
Barden v. *Northern Pac. R. R. Co.*, 154 U. S. 288, 330-31.

The California Supreme Court, for its decision in the case at bar, relied upon *Barden* v. *Northern Pacific R. R. Co.*, 154 U. S. 288, and *Northern Pacific R. R. Co.* v. *Sanders*, 166 U. S. 620, saying (17 A. C. 235):

"The patent which definitely located and established the railroad's claim stated that the Ames Tract was agricultural land. Plaintiffs reason that this statement is conclusive as to the nature of the land since the time for coming in and attacking the patent has long since expired, and conclude that since the title to the land secured by the patent relates back to the date of the railroad Grant Act, the full legal title to the Ames Tract had vested in the railroad before the conferring of extralateral rights upon the mines. The act alone, however, cannot be the source of title to any mineral lands. As Justice Field stated in *Barden* v. *Northern*

> *Pacific R. R. Co. supra,* the Railroad Grant Act of July 25, 1866, when it excepted mineral lands meant that title to all mineral lands was to remain in the United States, and no rights to such lands could in any way pass to the railroad. The patent issued to the railroad by virtue of the act could legally affect only non-mineral land, and the theory which relates the title back to the date of the act cannot extend to 'all mineral lands' excepted from the act in express terms. It follows that title to such mineral lands could be acquired as against the railroad subsequent to the enactment of the Railroad Grant Act, and at any time up to the date of the patent. (*Barden* v. *Northern Pacific R. R. Co., supra; Northern Pacific R. R. Co.* v. *Sanders, supra.*)

In neither of these cases had a patent been issued, hence the finality of a patent here involved was not involved in these cases, although in the *Barden* case the court, in discussing the finality of a patent, indicated by inference that if a patent had been involved the result of the case would have been the opposite. The holding of the *Barden* case was that mineral lands in the place limits of railroad grants could be located prior to patent. The California Supreme Court, when pressed as to the finality of a patent, as determined by *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, dismissed this case with the statement (17 A. C. 235):

> "Hence, the contentions advanced by plaintiffs can be resolved into the theory that the patent to the railroad is conclusive as to the agricultural character of the land. In support thereof they cite *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669 (34 Sup. Ct. 907, 58 L. Ed. 1527); *West* v. *Standard Oil Co.*, 278 U. S. 200 (49 Sup. Ct. 138, 73 L. Ed. 265); *Davis* v. *Wieboold, supra.* These cases, however, concern the rights of a mining claim coming into existence after the securing of the agricultural patent. They stand for the proposition that the patent is conclusive as to the character of the land as against mining claims subsequently located."

As pointed out, in neither the *Barden* case nor the *Sanders* case was a patent involved. In the three cases, which the California Supreme Court above states, were relied upon by petitioners herein, the patent was held to be a conclusive determination of the character of the land and such finality does not depend upon whether or not the mining claim was located before or after the patent was issued.

The California Supreme Court, therefore, fails to dispose of the *Burke* case by dismissing it with the comment above set forth. The *Burke* case is the rule of law declared by the United States Supreme Court and appellants are entitled to have the rule of this case properly applied in the case at bar. A patent issued by the United States Land Office is, therefore, conclusive as to the character of the land covered by the patent whether the mining claim originates before or after the patent is issued and no one can attack such patent collaterally.

In *Amador-Medean Gold Mining Co.* v. *South Spring Hill Gold M. Co.*, 36 Fed. 668, one Hammack made application to the Sacramento Land Office to purchase from the United States certain agricultural lands. The application was approved, the purchase money paid and the certificate of purchase issued June 15, 1874. On July 18, 1876, one McKim located a mining claim on land adjacent to the agricultural lands. The patent to the agricultural lands was issued September 13, 1876. Hence, the mining claims in this case came into existence before the patent was issued. Agricultural lands were subject to exactly the same sort of reservation of mineral rights as are railroad lands. The *Amador-Medean* case held that the mining claims had no extralateral rights. This case has been accepted as the law for many years. The ruling of the California Supreme Court is contrary thereto. In the case at bar, the railroad was constructed with the appurtenances specified and the map showing the location of the road as constructed was filed in the

Land Office July 27, 1870 (R. 191) which, according to the language of the court in *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 680:

> "And when by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the government. In other words, it earned the right to the lands described."

In other words, in the case at bar, as in the *Amador-Medean* case, the railroad company paid the consideration whereby it earned the lands thereafter patented to it. Therefore, the railroad company had earned the lands prior to the time of any location shown of the mining claims in question and thereafter procured the patent to the land whereby the result should be the same in the case at bar as in the *Amador-Medean* case. With reference to the *Amador-Medean* case, the California Supreme Court says (17 A. C. 234):

> "These cases, however, hold that at the time of final and definite location of agricultural or townsite land full title therein passes to the grantee as against any mineral rights not then known to exist but coming into being at a later time."

The statements of the California Supreme Court, above quoted, are directly contrary to the facts of the above cases. Its refusal to recognize the true facts of the cases was error and thus served to defeat petitioners' rights.

The California Supreme Court reasoned that respondent's claims had been located under miners' rules and regulations and extralateral rights thus acquired, that the rights thus acquired became vested rights *ipso facto* with the passage of the first mining statute July 26, 1866 (14 Stat. A. L. 251), that the extralateral rights forever thereafter remained appurtenant to mining claims whether patented or

unpatented, or even if abandoned and relocated again and again, and that since the title to the Ames land didn't pass until the patent was issued, the mining claims hence had senior title.

The entire reasoning of the court is false. We have shown that title to the Ames land passed at the date of the grant, July 25, 1866.

Miners on the public domain, prior to the first Act of Congress (July 26, 1866) authorizing the disposal of mineral lands, were trespassers.

Lee Doon v. *Tesh*, 68 Cal. 43;
Lindley, Mines (3d ed.), Sec. 41:

> "Of course, these pioneer miners were all trespassers. They had no warrant or license from the paramount proprietor."

Biddle Boggs v. *Merced M. Co.*, 14 Cal. 279, 374;
Castillero v. *United States*, 67 U. S. (2 Black) 17.

The first mining statute (14 Stat. A. L. 251) was not a granting act, no rights vested by virtue of its terms. It merely provided a policy and method whereby the title of the United States in mineral land could be acquired. Until the steps required by the statute to be taken were taken no right or title passed out of the United States. This seems so clear that argument to show it would be unnecessary but for the position taken by the California Supreme Court. Under this act no vested rights were acquired against the title of the United States by location, alone, of a mining claim. By section 2 of this act, it was only the patent that granted the title of the United States to the mining claim.

Silver Bow M. & M. Co. v. *Clarke* (1885) (5 Mont. 378), 5 Pac. 570, 573;
Black v. *Elkhorn M. Co.*, 52 Fed. 859, 860.

It was not until the passage of the act of May 10, 1872 (17 Stat. A. L. 91), that a miner, by virtue of his location, acquired vested rights. Therefore, since no patent was obtained for respondent's Pennsylvania claim under the Act of 1866, no vested rights were acquired under said act to said claim.

Section 2 of the Mining Statute of 1866 (14 Stat. A. L. 251) provided, in part:

> "* * * it shall and may be lawful for said claimant * * * to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles, and variations to any depth, etc."

By the terms of this statute, no rights were acquired against the title of the United States except by patent. A grant by the State or government is to be construed strictly against the grantee and in favor of the grantor.

Comparison of this section with the corresponding section of the mining statute of 1872 (17 Stat. A. L. 91) shows that in the latter act Congress adopted an entirely different theory with reference to the effect of a location. Section 3 of the latter act provides:

> "That the locators of all mining locations heretofore made or which shall hereafter be made * * * so long as they comply with the laws of the United States and the state, territorial and local regulations not in conflict with said laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, etc."

The Act of 1872 gave to the miner something he did not have under the Act of 1866. In other words, under the Act of 1872 the United States granted to the miner by virtue of his location the right to possession and enjoyment of his

mining claim. Under the Act of 1866 he got this right only by virtue of a patent.

The California Supreme Court says (17 A. C. 232):

> "A patent to the Pennsylvania claim was secured by the defendant's predecessors in interest on August 18, 1880, pursuant to the Mining Act of July 26, 1866."

In other words, this Court has said that in 1880 a patent was issued pursuant to the provisions of an act that was expressly repealed by Section 9 of the Act of May 10, 1872 (17 Stat. A. L. 91). The sections of the Act of 1866, under which a patent to a mining claim might have been obtained, together with the extralateral rights, were sections 2 and 3 of said Act. These sections were expressly repealed *in toto* by Section 9 of the Act of May 10, 1872.

The California Supreme Court says (17 A. C. 233):

> "It is clear that Congress intended by the Mining Act of July 26, 1866, to recognize and give legal validity to all existing mining claims in accordance with local rules, customs, and regulations, including extralateral rights in those lands to which such rules and regulations applied. (*Lindley, Mines* (3d ed.), Secs. 40-46; *Jennison* v. *Kirk,* 98 U. S. 453; *St. Louis Smelting & Ref. Co.* v. *Kemp,* 104 U. S. 636; *Morton* v. *Solambo C. M. Co.,* 26 Cal. 527."

None of these authorities stand for the proposition that the Act of 1866 (14 Stat. A. L. 251) constituted a grant of title of the United States to miners on the public domain who prior thereto had located mining claims on the public domain. Nor do any of these authorities hold that by location alone under the Act the locator acquired title, legal or equitable, from the United States. The cases do stand for the proposition that where two claimants base their rights upon the same Act of Congress (the Act of July 26, 1866), the order of their rights shall be governed by the order of

their possessions, respectively. This *recognition* is limited to those claiming under the Act of July 26, 1866, and does not control rights granted by other Acts of Congress, especially those previously passed. In other words, the United States could say that the rights of miners A and B, when acquired under the Act of 1866 or the Act of 1872, should be determined by the order of their possession, respectively, even if possession preceded the Act of 1866.

5. Title to the school land in Section 16 vested as a common-law fee in the State of California upon the filing of the Township and section survey in the land office.

The township and section survey, wherein said section 16 is located, was filed in the Land Office August 6, 1867 (R. 115). On this date the title of the United States vested in the State of California.

Cooper v. *Roberts*, 18 How. 173, 179;
Frasher v. *O'Connor*, 115 U. S. 102, 115.

Therefore, unless the title of the United States in the mining claims with extralateral rights had passed out of the United States prior to the vesting of title to the school land, the latter title carried all the subsurface rights of a common law fee. Since miners on the public domain, prior to July 26, 1866, were trespassers, they could acquire no vested rights, and since they could acquire no vested rights under the act except by patent, it makes no difference whether the claims in question were located before or after the passage of the act, the title of the United States was clear, was a common law fee, and such title vested in the State of California.

The California Supreme Court disposes of this point by saying (17 A. C. 232):

> "Between the Ames Tract and the Pennsylvania and Jefferson mines there is a narrow strip of school land

granted to the State of California under the Act of Congress of March 3, 1853 (10 U. S. Stat. A. L. 244), and this grant also excepted mineral lands from its terms. Subsequent to its final survey in 1867, part of this land was conveyed to the defendants, the residue remaining in the hands of the state as school land. Plaintiffs contend that the state acquired a fee simple in this land, including the subsurface, so that defendants could have no extralateral rights therein and were thus effectively cut off from the Ames Tract."

The California Supreme Court then disposes of petitioners' contention by holding that vested rights were acquired by locations under miners' rules and regulations. We have shown that such miners were trespassers on the public domain and hence could acquire no title, without a grant from Congress.

6. The title of respondent's Pennsylvania claim had its inception under the Act of May 10, 1872 (17 Stat. A. L. 91). This act limited the length of claims to 1,500 feet.

The Pennsylvania claim, as patented, is 1540 feet long (R. 255). The application for patent was filed May 31, 1880 (R. 218). The patent was issued August 18, 1880 (R. 257). We have shown that no title could be obtained by miners by location under their rules and regulations except as among themselves, that no title could be obtained under the Act of 1866 without a patent, hence the Pennsylvania title can come only from the Act of 1872. In discussing respondent's evidence of location hereinafter, we will show that no locations were proved prior to 1872.

If the Pennsylvania title springs only from the Act of 1872 it can have only such rights as the act gives. Section 2 of the Act of 1872 requires that the end lines of a claim located thereunder shall be parallel. Lack of parallel end lines defeats the extralateral right.

Lindley, Mines (3d ed.), Sec. 582.

The same section of the same act limits the length of claims to 1500 feet. Therefore, the same result as to extralateral rights follows the patenting of a claim in excess of the length prescribed.

The California Supreme Court disposes of this point by saying (17 A. C. 237):

> "Plaintiffs argue further that the Mining Act of 1872, by restricting future mining claims asserting extralateral rights to a maximum of 1500 feet along the vein, precludes the patent to the Pennsylvania mine, secured at a later date, from encompassing extralateral rights based upon a greater length. The mining patent cannot thus be limited by that act, however, when issued in pursuance to the earlier act of July 26, 1866, on the basis of an earlier location. (Citing authorities.) The plaintiffs themselves declare that a patent properly issued and in conformance with the provisions of an Act of Congress relates the title back to the data of that act. Furthermore, the additional length of the claim resulted from the consolidation of three original claims, the lines of which need not be shown to establish the validity of an existing patent to the consolidated claim on collateral attack."

The vice of this statement of the California Supreme Court is twofold, first a misapplication of the law as to obtaining title under miners' rules and regulations and the Act of 1866, and second, in its statement that "the additional length of the claim resulted from the consolidation of three original claims, the lines of which need not be shown to establish the validity of an existing patent to the consolidated claim on collateral attack." Respondent failed to prove any miners' rules and regulations authorizing the location of mining claims of any length whatsoever and, further, failed to prove any locations.

7. The burden of proving the right to mine under petitioners' land rested upon respondent. Respondent sought

to show a senior title. The evidence respondent produced in this regard was largely inadmissible being hearsay and self-serving declarations, and failed entirely to prove the issue.

Evidence to establish a location of a mining claim should meet the requirements of the general rules of evidence, as to admissibility and as to sufficiency. Otherwise property of the Federal government is being disposed of without due proof of compliance with Federal statutes.

Without regard to what respondent's proofs were, we have shown that as a matter of law, respondent's predecessors could not acquire title senior to the title of petitioners. Prior to July 26, 1866, Congress had not authorized the disposal of mineral lands. On July 25, 1866, Congress granted petitioners' land to the railroad company. But, aside from the question of law, we propose to show that respondent's evidence did not meet the issue. The requirements of law to establish title or possession under miners' rules and regulations are laid down in *Pralus* v. *Jefferson G. & S. M. Co.*, 34 Cal. 558, 562:

> "Our conclusions, therefore, are: First—That in order to maintain an action of this character in respect to a mining claim on the public domain, the plaintiff must establish at least a constructive possession at the time of the commencement of the action. Second—That such constructive possession can only be established by the proof of three facts: 1. That there were local mining customs, rules and regulations in force in that particular district; 2. What particular acts were required by such mining laws or customs to be performed in the location and working of claims, and the extent of each claim as authorized by such laws; 3. That the plaintiffs have substantially complied with these requirements."

The first requirement of proof is "that there were local mining customs, rules and regulations in force in that particular district."

Also, Mr. Lindley says (*Lindley, Mines* (3d ed.), Sec. 272:

> "Judicial notice cannot be taken of the rules, usages and customs of a mining district and they should be proved at the trial like any other fact by the best evidence that can be obtained respecting them."

The particular acts to be done as required by the local laws and customs must be shown, and performance of such acts required must be shown.

Lindley, Mines (3d ed.), Sec. 176:

> "The character of the land being thus established, its proper location, marking of boundaries and compliance with the local laws, if any such exist, is necessary to perfect a valid mining claim."

Williams v. *Santa Clara Mining Assn.*, 66 Cal. 193, 198:

> "A 'mining claim', as the term is used in the statutes of the United States, is that portion of a vein or lode and of the adjoining surface or of the surface and subjacent material to which a claimant has acquired, the right of possession by virtue of compliance with the laws of the United States and the local rules and customs of miners."
>
> *Daggett* v. *Yreka Mining Co.*, 149 Cal. 357, 365.

8. Respondent's Evidence of Location.

To establish the burden cast upon respondent, respondent offered in evidence, as its Exhibit A, certified copies of all of the papers in the proceeding for patent of the Pennsylvania Mining Claim, based on the application for patent, filed May 31, 1880 (R. 218-256). These documents of this exhibit were:

(1) The application for patent (R. 218-223);
(2) The surveyor's report (R. 223-226);
(3) Articles of Incorporation (R. 226-227);

(4) An affidavit of James Cary, giving excerpts of minutes of meetings of miners of Browns Valley (R. 227-230);

(5) An abstract of title (R. 234-242);

(6) An affidavit of one William Smith (R. 242-243);

(7) A complaint, answer and judgment in an adverse suit (R. 244-249);

(8) Receiver's Receipt (R. 249-250);

(9) Certificate as to publication (R. 250-251);

(10) Application to purchase (R. 251-252);

(11) Register's Final Certificate of Entry (R. 252-253);

(12) Receiver's Receipt (R. 253-254);

(13) Mineral Patent (R. 254-257).

Defendant's Exhibit A was admitted in evidence over objection of plaintiff's counsel (R. 35).

The application for patent is hearsay and is a self-serving statement and, for this reason, is inadmissible in evidence. The subscriber to the application states that his knowledge of the location of the Pennsylvania claim is hearsay (R. 220). A certified copy of this application furnished by the United States Land Office did not render the copy admissible, or any less hearsay or selfserving than the original document.

22 C. J. 220:

> "It is a well established general rule that a statement of a party, whether oral or written, which is of a self-serving nature, is not admissible in evidence in his favor while such statements are usually made because the declarant is for some reason, interested, at the time, in having the fact supposed, or believed to be as stated by him, the element of present interest is not essential, for it has been considered that the rule applies with full force notwithstanding the fact that the declarant was disinterested at the time when the statement was made."

The copy of the surveyor's field notes, being an official document prepared by an officer of the Land Department, is admissible in evidence to prove such acts of the surveyor as he performed in his official capacity. However, these field notes contain no evidence as to the existence of rules and regulations in the Browns Valley Mining District, what the rules were, or compliance therewith by respondent's predecessor.

The copy of the Articles of Incorporation of the Pennsylvania Mining Company, certified to by the United States Land Office, was not admissible in evidence under the California Code of Civil Procedure. The law of the State of California requires original articles of incorporation to be filed with the Secretary of State and a certified copy thereof with the County Clerk of the county in which the corporation has its principal place of business.

The California Code of Civil Procedure, Sec. 1894, provides what writings are public writings.

C. C. P., Sec. 1919, provides:

> "A public record of a private writing may be proved by the original record or by a copy thereof certified by the legal keeper of the record."

Under the foregoing code sections, a certified copy of the copy of the articles of incorporation filed in the United States Land Office is not admissible in evidence. The Secretary of State is the legal keeper of the original articles and the only person who can furnish a certified copy that is admissible in evidence.

The copy of the affidavit of James Cary is hearsay. The use of affidavits as evidence in the State of California is governed by Section 2009, California Code of Civil Procedure, which provides the extent to which affidavits may be used in evidence.

Lacrabere v. *Wise,* 141 Cal. 554, 556.

The evidence in one trial cannot be used in another trial unless the parties in the other trial are the same or in privity.

22 C. J. 428:

> "In order to warrant the reception of evidence given at a former trial it must appear that the parties to the latter trial are, either actually or constructively, the same, as otherwise the party against whom the evidence is offered could not have had the opportunity of cross-examining the witness."
>
> *Tappen* v. *Beardsley*, 77 U. S. (10 Wall.) 427, 434.

The abstract of title which was filed with the application for patent in the United States Land Office is not admissible in evidence under California law.

Dahler v. *All Persons*, 163 Cal. 160, 164.

The copy of the abstract offered and received in evidence was unauthenticated, other than it was certified as a true and correct copy of the abstract on file in the United States Land Office. The abstract purported to be an abstract of documents of record in the County Recorder's office in Yuba County, the very county in which this action was tried. Certified copies of the documents abstracted could have been obtained from the County Recorder of Yuba County and, under the Code of Civil Procedure, Section 1919, above quoted, could have been used in evidence if otherwise admissible.

Furthermore, beside the fact that the abstract was inadmissible in and of itself, the documents abstracted were inadmissible.

Wigmore (2d ed.), Sec. 1572:

> "There is a limited use of deed recitals by way of exception to the hearsay rule, which has its root in orthodox and ancient tradition, and yet has never received great encouragement, and finds recognition in

only a small number of precedents. This use of deed recitals seems to have been recognized for at least half a dozen distinct purposes. * * *

"(8) In *mining claims,* a recital of discovery of a lode or vein, in a prior document of claim, may by custom be admissible.

"Apart from the foregoing specific rules, a recital in an *ordinary deed or document* of title has no ground for being regarded as anything but inadmissible hearsay."

The record, of course, does not disclose what the documents abstracted contain and petitioners had no opportunity to object to the admissibility of the documents abstracted since they were not offered in evidence.

The Affidavit of William Smith is hearsay and inadmissible for the same reason given for the inadmissibility of the affidavit of James Cary.

The complaint, answer and judgment in the adverse suit was inadmissible for the reason that the statements therein contained are hearsay and selfserving statements. Upon the same reasons above given, the remainder of the documents above listed in defendant's Exhibit A are inadmissible. Nothing contained in defendant's Exhibit A shows the existence of miners' rules and regulations prior to 1863, or subsequent thereto; it does not show what acts were to be done to locate a claim under miners' rules and regulations; it does not show any compliance therewith by any of respondent's predecessors in title.

The documents of defendant's Exhibit A, therefore, are inadmissible, but if admissible, they failed to prove the facts of location under miners' rules and regulations which respondent contends would establish seniority for its title.

Defendant's Exhibit H.

Defendant's Exhibit H (R. 286-329) consists of copies of documents on file in the United States Land Office

relating to a prior application, made in 1874, for a patent on the Pennsylvania Mining Claim. These documents were inadmissible in evidence for the reasons given for the inadmissibility of the documents contained in defendant's Exhibit A.

Furthermore, patent records, as such, do not become admissible in evidence merely because they are patent records. Mr. Lindley says (Lindley, Mines (3d ed.)), Sec. 783, p. 1920:

> "While these records are ordinarily received in court as evidence of the facts stated therein, we are of the opinion that the original location and the date of actual discovery must be proved by evidence other than that furnished by the patent record. This seems to be the rule sanctioned by the courts."

Champion Mining Co. v. *Mining Co.*, 75 Cal. 78, 82:

> "* * * It is therefore, somewhat difficult to see how the question of priority of location between the Phillip and Wyoming ledges could be adjudicated in a proceeding in which the location of the Phillip ledge was not involved at all; or how *ex parte* proof, offered in the Wyoming application for the satisfaction of the United States government, is admissible in the case at bar, where the contest is about something not appearing on the face of that application, or involved in that proceeding. If, therefore, the determination of this appeal necessarily depended upon the correctness of the ruling of the court below, admitting the proceedings in the land-office in evidence, we would be strongly inclined to hold such ruling to have been erroneous. In the view which we take of the case, however, it is not necessary to pass conclusively upon that question."

Driskill v. *Rebbe*, (S. D. 1908) 117 N. W. 135;
Smelting Co. v. *Kemp*, 104 U. S. 636.

At page 639 the court says:

> "As seen by the statement of the case, the plaintiff relies for a reversal of the judgment upon three grounds. First—Error in admitting the record of proceedings of the land office to impeach the validity of the patent to the Starr issued upon them; * * *
>
> "We are of the opinion that these several grounds are well taken, and that in each particular mentioned the court below erred."

If the papers on file in a proceeding for patent are not admissible to impeach the very patent based upon them, certainly such papers are not admissible to impeach a patent not based upon such records. The soundness of the holding of the court in the *Smelting Company* case is too evident to require discussion. A judgment rendered by a court of competent jurisdiction cannot be impeached collaterally by the pleadings and evidence upon which the judgment is based.

Respondent also offered in evidence an unauthenticated typewritten copy of what defendant stated to be an *excerpt from "Mineral Resources by J. Ross Brown."* The circumstances of the admission of this document in evidence are set forth in the testimony of the witness W. W. Waggoner (R. 43-45), wherein Mr. Waggoner testified that he resided in Nevada City for forty-eight years; that he was a civil engineer and had compiled sources of information on the territory in which he operated, that he had in his possession a copy of a public document, dated January 8, 1868, titled "Report of J. Ross Brown on Mineral Resources of States and Territories West of the Rocky Mountains"; that he had prepared excerpts therefrom. Thereupon, the excerpt (R. 273-281) which Mr. Waggoner prepared was offered and received in evidence over the objection of petitioners. If the document which the witness Waggoner stated that he had in his possession had been offered in evidence it could have been received in evidence only under

the provisions of the California Code of Civil Procedure, Sec. 1918, which provides:

> "Manner of proving other official documents may be proved as follows: * * *
>
> "9. Documents in the departments of the United States government by the certificate of the legal custodian thereof."

An excerpt of a document is not admissible in evidence without offering in evidence the entire document. The entire document, if admissible at all, is admissible in evidence only under the circumstances set forth in California Code of Civil Procedure, Sec. 1918, Sub. 9, above quoted. But the entire document is not admissible in evidence, it is hearsay. It does not qualify as an official document.

46 C. J. 922;

Coulter v. *Pool*, 187 Cal. 181, 186.

Respondent also offered in evidence an unauthenticated copy of what defendant stated to be an excerpt from Document No. 210, "Statistics of Mines and Mining in the States and Territories West of the Rocky Mountains" by Rossiter W. Raymond, United States Commissioner of Mining Statistics. The circumstances of the admission of this excerpt in evidence are set forth in the testimony of the witness W. W. Waggoner (R. 43-45), wherein Mr. Waggoner testified that he had in his possession a copy of said document No. 210, whereupon, and over the objection of petitioners, the excerpt was received in evidence. The excerpt consisted of a quotation taken by the author from a newspaper. This excerpt will be found in the Record pp. 282-283. This exhibit is subject to all of the objections that the excerpt from "Mineral Resources" by J. Ross Brown is subject to and the further objection that it is merely the copy of a newspaper report, which newspaper

report itself is hearsay and not admissible in evidence. The fact that it is copied in some document does not make the copy more admissible than the original source itself would be.

Respondent also offered in evidence an unauthenticated typewritten copy of what defendant stated to be an excerpt from a work called "History of Yuba County, 1879" by Chamberlain and Wells, admitted in evidence (R. 48) (Document at R. 284-85). No foundation whatsoever was laid for the admission of this work, or an excerpt therefrom, in evidence. It was not shown to be authentic. It was not offered for the purpose of proving facts of general notoriety and interest (California C. C. P., Sec. 1936). In fact, the purpose of this evidence was to prove something that no one knew anything about. Such works are not admissible to prove particular facts or customs.

Bank of England v. *Anderson*, 4 Scott 83;
Roe v. *Strong*, 107 N. Y. 350;
State v. *Moy Looke*, 7 Ore. 54;
Allen v. *Halstead*, 39 Tex. Civ. Ap. 324, 87 S. W. 754.

Aside from the inadmissibility of the excerpts, above discussed and received in evidence, they fail to prove that there were rules and regulations in the Browns Valley Mining District at the time respondent contends its mining claims were located. They fail to prove any acts done by respondent's predecessors as to location, if any locations were made under the unproven rules and regulations.

Finally, respondent produced two witnesses: One, Mrs. Emma Hibbert (R. 49-59) who testified that she was seventy-eight years old; that she came to Browns Valley when she was four years old, at which time the mills were running and that her father worked in and about the mine. She gave no evidence as to miners' rules and regulations, the acts required thereby for the location of mining claims

or any acts done by respondent's predecessor as to location of any mining claims whatsoever. Respondent's second witness, Mrs. Ann Burris, whose testimony was given by deposition (R. 60-77), testified that she was seventy-six years old at the date of the deposition (1937); that she came to Browns Valley in 1862. She was, therefore, in her second year at the time of her arrival in Brown's Valley. She gave certain testimony as to work being carried on on the Pennsylvania and Jefferson mines in 1866 but gave no testimony whatsoever as to miners' rules and regulations, the acts required thereunder for location, or any acts done by respondent's predecessor thereunder. There is, therefore, no evidence in the record to support the trial court's finding 3 and 4 (R. 12-13), and finding 9 (R. 14). Such requirements of proof cannot be supplied by presumption.

Daggett v. *Yreka Mining etc. Co.*, 149 Cal. 357, 365.

9. Ruling of the California Supreme Court on the Above Evidence.

Notwithstanding the character of the foregoing evidence, the California Supreme Court held that it proved a title in respondent senior to the title of petitioners, and title in respondent senior to the title of the State of California in the school land. The California court says (17 A. C. 232):

> "Defendants have presented evidence in the form of testimony of old settlers, abstracts of title, patent records, deeds, and government reports and surveys to prove the original location of both the Pennsylvania and Jefferson claims in accordance with the miners' rules and regulations prior to 1863; the working of these claims, including the subsurface of the Ames Tract, prior to 1866; the securing of a patent to the Pennsylvania mine in 1880, with a continuous chain of title to this mine culminating in the present defendants as against all existing claims on the Jefferson mine."

The California court stated that the evidence came within exceptions to the hearsay rule, saying (17 A. C. 239):

> "Defendants introduced properly authenticated copies of deeds and other instruments now of record in the county recorder's office in Yuba County, patent records on file in the official records in the General Land Office in Washington, D. C., printed official reports of the 'Mineral Resources' of the public domain of the west, published under authority of congress and other historical material. This evidence was supplemented by the oral testimony of two old settlers that both the Pennsylvania and the Jefferson mines were in operation on the present location in the early 1860's. The case of Kent *v.* Snyder et al. (1866), 30 Cal. 666, which mentions in its statement of facts the location of the Jefferson claim by its original owners corroborates the existence of this claim prior to 1866."

We have discussed above the inadmissibility of the evidence mentioned in the quotations from the opinion of the California court above, except two items. The California court says "defendants have presented evidence in the form of * * * deeds", and, again "defendants introduced properly authenticated copies of deeds and other instruments now of record in the County Recorder's office of Yuba County." There is absolutely no foundation in the record for this statement by the California court. Respondent did not offer in evidence a single deed, nor a single authenticated copy of a deed. Instead, respondent relied upon a copy of the abstract of recorded documents, which abstract was filed in the United States Land Office with the application for patent in 1880. If the documents abstracted, or properly authenticated copies thereof, had been offered in evidence there would have been no purpose in using the abstract. We are at a loss to understand this statement by the California court.

The second item which the California court treats as evidence is a statement of facts in *Kent* v. *Snyder*, 30 Cal. 666. There was not one record from the case of *Kent* v. *Snyder* introduced in the case at bar. The consideration of these facts is directly contrary to the holding of the California court in *People* v. *Newell*, 192 Cal. 659, 668, wherein the court says:

> "It is urged by appellant that because both informations were identical except in the particular already mentioned, a question of law only was presented which the court should decide, thus ignoring the rule laid down in the authorities we have cited that special pleas must be supported by evidence and determined by the jury, even when both trials have been held in the same court. In such circumstances the court does not take judicial notice of what is contained in its files, the records, or the evidence, but proof must be offered by the defendant to sustain the pleas."

The foregoing discussion indicates also that there is no foundation for the statement of the California court (17 A. C. 238) that "the additional length of the claim resulted from the consolidation of three original claims, the lines of which need not be shown to establish the validity of the existing patent to the consolidated claim on collateral attack."

If respondent failed to prove any location or acquisition of rights under the Act of 1866, its location of its Pennsylvania claim is based merely on the presumption that a location was made prior to patent. This presumption does not relate to any particular time and, since the patent was granted in 1880, under the Act of 1872, the effect of the presumption is that the Pennsylvania claim was located under the Act of 1872.

10. Respondent's Jefferson Claim.

(1) The Jefferson is that part of the vein which has its apex in the Jefferson claim. Respondent's right to mine

on this vein under the Ames land is derived solely from the reservation contained in the deed to petitioners (R. 213).

The earliest location to which respondent attaches its title in this claim is the F. W. Johnson location, made June 4, 1891 (R. 260). Petitioners contend that respondent has no extralateral rights in their land with reference to this claim for all the reasons above given as to the Pennsylvania claim;

Under the decision of the California Supreme Court this claim may be abandoned and relocated over and over again, and each locator with each new location acquire a new extralateral right in the Ames land. If this claim should be forever abandoned and be disposed of as agricultural by the United States, to whom would this vein belong? Clearly, this claim has no extralateral rights in the Ames land.

In conclusion, we submit that Mr. Justice Carter, in his dissenting opinion, has clearly analyzed the situation presented by the controversy between the parties hereto and that he has reached the right conclusion with reference thereto.

We submit, therefore, that the judgment of the California Supreme Court affirming the judgment of the Superior Court of Yuba County should be reversed, and this matter remanded to the Yuba County Superior Court for the purpose of ascertaining petitioners' damage suffered by reason of respondent mining petitioners' ore.

Respectfully submitted,

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